HOGAN & HARTSON
L.L.P.

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910

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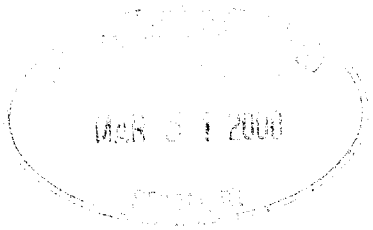
BY HAND DELIVERY



Secretary Donald Clark
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313 – Comment

Dear Mr. Clark:

We are writing on behalf of our client, VerticalOne Corporation, to comment on the Federal Trade Commission's ("FTC") proposed rule implementing the Gramm-Leach-Bliley Act, Pub. L. No. 106-102 ("GLB Act" or "Act"). Our client is a company that provides technology solutions and services to Internet destination sites, including sites owned by banks, credit unions and other financial institutions (collectively, "enabled sites"), that enable the sites to offer services to their customers. The proposed regulation treats third parties that provide services to financial institutions inconsistently. This comment letter identifies inconsistencies in, and recommends clarifications to, the proposal.

Coverage of Internet Technology Solution Providers.

Technology solution providers ("TSPs") provide the technology for financial institutions and providers of other Internet-based services to offer their customers access to certain services via the Internet. A TSP may enter into an agreement with the owner of an enabled site ("Enabled Site Owner") that permits the Enabled Site Owner to brand the service so that it appears to the customer that the enabled site is providing the service directly. This relationship will be referred to as "private labeled service." Alternatively, an Enabled Site Owner may prefer to have the TSP's provision of the service obvious to the customer. The customer has access to the service only because the Enabled Site Owner has a contract with the TSP to provide the service, but the TSP's role as the provider of the service is clear to the consumer. This relationship will be referred to as "co-branded service." An Enabled Site Owner may select the co-branded service because it may simplify provision of the service, making it less expensive and more efficient. While the TSP provides the same service in both scenarios – integrating its technology solution to

the enabled site's system to provide the Enabled Site Owner's customers with a service – the TSP's obligations and treatment under the proposed regulation may differ between the two services.

"Financial institution" is defined broadly in the proposed regulation to cover entities significantly engaged in financial activities, as described in section 4(k) of the Bank Holding Company Act of 1956 ("BHCA"). Proposed section 313.3(j)(1). A financial service or product is any product that a financial holding company could offer. Proposed section 313.3(k). Many services performed by TSPs are services that banks would be permitted to engage in directly since the activities typically are related to data processing. Under the FTC's broad interpretation, a TSP would be subject to the proposed regulation as a "financial institution." When providing private labeled services, the TSP may not be required to provide a privacy policy notice since it has not established a customer relationship. See section-by-section analysis, proposed section 313.3(j) (notice may not be required if the financial institution has no "consumers" or "customers"). When providing co-branded services, in which the TSP interacts with the Enabled Site Owner's customers, the TSP could be required to provide its privacy policy notice.

The definition of financial institution creates uncertainty for entities such as TSPs for which a determination of whether a privacy policy notice is required depends on the Enabled Site Owner's choice in co-branding or private labeling the service. The status of TSPs and other parties providing financial institutions with the ability to offer certain products or services to their customers is further complicated by the proposed regulation's two exceptions for parties that provide services to financial institutions. Proposed section 313.9(a) provides that a financial institution may provide information to a nonaffiliated third party *to perform services for or functions on behalf of the institution*. The institution must include in its privacy policy notice a description of the categories of information shared with the third party and the categories of third parties with which the financial institution has a contract. Additionally, the parties must enter into a contractual agreement requiring the third party to maintain confidentiality and to refrain from using the information for a purpose other than for which it was provided.

Proposed section 313.10(a)(2) permits a financial institution to disclose information *to service or process a financial product or service requested or authorized by the consumer*. Disclosure of information under this section does not

need to be included in the financial institution's privacy policy notice, but the third party may not disclose the information to nonaffiliated third parties nor use the information for any purpose other than the purpose for which it was provided.

The proposed regulation does not clarify when a party, such as a TSP, would be considered a financial institution under proposed section 313.3, a third party performing services for an institution under proposed section 313.9, or a third party servicing or processing a financial product or service under proposed section 313.10. The Act also permits a financial institution to disclose nonpublic personal information with the consent of the consumer. However, the institution's privacy policy still must be provided if the party has an existing customer relationship with the consumer. Proposed section 313.11(a)(1).

Although the TSP is providing the same technology solution in each of these scenarios and customers receive the same service, the notice provided and limitations on the internal use of information differ under each provision and for each type of service. The proposal does not address whether the TSP's obligation depends on how the enabled site defines its relationship with the TSP or whether the TSP can determine its proper categorization regardless of the enabled site's classification.

The FTC has invited comment on the application of the proposed rule to entities that may be "financial institutions" under the Act but may not be subject to the disclosure requirements of the rule because they have no "consumers" or "customers." Section-by-Section analysis, section 313.3(j). We recommend that the FTC revise proposed section 313.3(j)(3) by adding a new subsection (v) as follows:

> (3) Financial institution does not include:
>
> . . . (v) A business that provides technological solutions or services to a financial institution, or to the financial institution's customers pursuant to an agreement with the financial institution, as long as such business does not disclose nonpublic personal information to a nonaffiliated third party.

This proposed revision would remove TSPs from the disclosure requirements imposed on financial institutions while protecting consumers from unknown and unlimited sharing of their nonpublic personal information. It also would reduce

consumer confusion when obtaining a service from an enabled site, as explained below.

Clarify which party is responsible for providing notice when a financial service is provided by one party through another party.

If TSPs are considered financial institutions under the final regulations when a co-branded service is used to provide the financial service to consumers, the TSPs would be required, under the proposed regulations, to provide clear and conspicuous notice of their privacy policies and practices to their customers. This would allow the TSPs unlimited internal use of any nonpublic personal information they obtained but would subject them to disclosure limitations.

One concern is that consumers will be confused by receiving multiple notices in connection with obtaining a single service. While the regulators can dissect each service and process to determine the provider, consumers do not view the provision of financial services in the same stratified manner. Consumers may be aware of the parties involved in cashing a check or processing a credit card, for example, but the customer looks to his bank or issuer to resolve problems, protect the customer's rights, and take care of the transaction. The segmentation required by the Act and the regulations may complicate issues for consumers.

For example, a consumer signs up to receive online services from an enabled site. In establishing this relationship, the customer would receive a privacy policy notice that may contain certain opt-out opportunities. After establishing a direct customer relationship with the enabled site, the customer then seeks to obtain one of the services offered on the enabled site. This additional service requires the customer to complete a separate registration process. In completing this second registration process, the customer gives information directly to a TSP. The customer's awareness of the role of the TSP may vary. The customer receives a privacy policy notice from the TSP. At this point, the customer has two privacy policies regarding the services it obtains at the enabled site. Does the enabled site's privacy policy act as an additional layer, modifying the notice provided by the TSP?

Confusion caused by overlapping of notices and conflicting privacy policies could be minimized if proposed section 313.4(b) were revised to clarify that a TSP, or similar service provider, that interacts with consumers only through

enabled sites, would not be required to provide a notice to a consumer or customer unless it will be disclosing information to nonaffiliated parties. Such language would allow the enabled site with the customer relationship to establish the general parameters governing disclosure of nonpublic personal information for all services the enabled site offers – either directly or with or through a service provider. Only actions by the TSP that would result in further disclosure of information would trigger an additional disclosure. This approach minimizes the problems arising from multiple notices while satisfying the Act's purpose.

Identify the appropriate regulator and regulation covering a jointly provided service.

When a financial service or product is provided by one financial institution for another financial institution, questions arise about applicability and enforcement of the privacy regulations. Regulatory and enforcement authority has been divided among the four banking regulators, the National Credit Union Administration, the Securities Exchange Commission, the FTC, Treasury, and state insurance authorities. While the regulators are working to develop consistent regulations, the proposed regulations are not identical and may, as they are interpreted over time, diverge. This regulatory scheme complicates matters for parties that have a contract to offer services to consumers.

If a TSP, governed by the FTC's regulations, contracts with a national bank to provide certain financial services for the bank's customers, and the TSP is classified as a financial institution under the FTC's rules, would the privacy notices sent to those customers be required to comply with the regulations and interpretations of the OCC or with those of the FTC? Customers accessing the service from a national bank may expect to be protected by the OCC's regulation. Alternatively, a national bank examiner may look at the TSP's activities as a service provider rather than as a financial institution and find that the national bank is disclosing information to a third party service provider that is not adequately limiting its use of the information it receives, in violation of section 40.12(b)(2). The proposed regulation should be revised to clarify the boundaries of each regulator's authority when two entities, governed by different regulators, jointly offer a product to one entity's customers.

Eliminate the limitation on use of information received as a service provider.

The Act provides for several exceptions to the prohibition on disclosure of information to nonaffiliated third parties. One exception is for parties that perform services for or functions on behalf of financial institutions. GLB Act, § 502(b)(2). The financial institution is not prohibited from disclosing information to this party provided that the institution includes this disclosure in its privacy policy notice and enters into a contractual agreement with the third party to maintain confidentiality of the information disclosed. Such information sharing is subject to any regulatory requirements.

The FTC's proposed regulation adds a requirement that the third party's use of information it receives from the institution about the customer is limited to the purpose for which the information was disclosed. Proposed section 313.9(a)(2)(ii). This requirement, created by regulation, is unnecessary to protect consumers. The third party already is prohibited from disclosing the information to others. Its internal use of the information – to develop marketing strategies, refine credit models, or create new products or services, for example – does not violate the purposes of the Act or harm consumers. We recommend that the limitation on use be removed from proposed section 313.9(a)(2)(ii).

A similar requirement has been proposed, in connection with proposed sections 313.10 and 313.11, to limit use of information by nonaffiliated third parties to the purpose for which the exception was granted. As with the limitation inserted in section 313.9, we recommend that the FTC eliminate the limitation on use since the statutory provision does not require this interpretation and the interpretation does not satisfy the goals of the Act. *See* GLB Act, §§ 502(c), 501(a).

Under the suggested revisions, treatment of TSPs would be more consistent. The TSP, whether treated as a servicer/processor or service provider, would be permitted to use internally the nonpublic personal information it receives from a financial institution's enabled site in accordance with its agreement with the financial institution. If the TSP planned to disclose information to nonaffiliated parties, it would be treated as a financial institution and required to provide customers with initial and annual notices of its privacy policy, including any opt-out opportunities. This recommended scheme gives consumers the protection intended by the Act while eliminating unnecessary obstacles to providing customers with the opportunity to obtain additional services via the Internet.

If you have any questions, please contact me at 202-637-5561.

Sincerely,

Pamela M. Blumenthal

Pamela M. Blumenthal